No. 14909.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,

Appellants,

vs.

ANTHONY VITCO,

Appellee.

APPELLANTS' REPLY BRIEF.

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Prefatory Statement.

The Statement of the Pleadings and Facts Showing Jurisdiction and the Statement of the Case and Questions Involved, as contained in appellants' opening brief, set out the issues herein and appellants respectfully submit that such need not be repeated here.

Appellee's brief contains, generally, the following points in the order named:

1. That the seaman may not under any circumstances contract away his right to wages to the end of his term of employment and that therefore paragraph V of the collective bargaining agreement [Resp. Ex. B] is void as against public policy.

2. That said collective bargaining agreement is ambiguous as to the question of fishing seasons and that

it does not support appellants' contention that the fishin season in which Vitco fell sick ended on June 30, 1952 and further that there was in fact an agreement t employ for the entire year and that such prevailed ove the collective bargaining agreement.

3. That a seaman is entitled to maintenance and cur beyond the time at which the maximum cure is obtained

Appellants will reply to each of these points in the orde set forth, numbering their arguments accordingly:

Summary of Reply Argument.

1. The courts have repeatedly held that a seaman ma contract away his various rights for a consideration unles such contract is specifically barred by statute; further that none of the cases cited by appellee in his brief sup port appellee's contention in that regard. There is nothin in the public policy of the present time that would in validate the provisions of Paragraph V of the said col lective bargaining agreement and that the sole basis fo the admiralty courts considering the seaman a "ward has disappeared.

2. The collective bargaining agreement, not havin been attacked in any manner except that the lower cour held paragraph V thereof void, effectually designate and establishes the two seasons in each calendar yea without any ambiguity and that Vitco was bound thereby further, that there was no contract to employ for a yea and that the prevailing custom and practice in San Pedr was to hire but for the single trip or voyage.

3. The seaman is entitled to maintenance and cur only until the time that the maximum benefit has bee obtained.

Argument.

1. On page 11 of his brief, appellee sets out that agreement which tends to deprive a seaman of his rights under the maritime law will be declared void. Appellants maintain that such agreements are valid if done for a consideration.

There is nothing authoritative in the decisions cited by appellee holding that a seaman may not, *for a consideration,* bargain away a right given to him under the law. Counsel for appellants has carefully reviewed each of the said citations beginning on page 11 of appellee's brief through to the middle of page 13. Each of them either supports appellants' position, refers to an absolute prohibition of certain contracts by statute (which is not the case at bar), or is pure dicta:

The Cypress, 6 Fed. Cases 1104, was a case in which there was an agreement in the shipping articles that the seamen would not sue for their wages when due, *i.e.* that the seamen would wait for a period of three months before bringing suit. *There was no consideration for this agreement* and, according to the accepted common-law rule of contracts, it was declared void, such holding being inapplicable to the case at bar.

The General J. A. Dumont, 158 Fed. 312, was a case in which the entire issue, as far as a seaman's right was concerned, was whether a seaman was entitled to his lien against the ship regardless of certain agreements in the charter contract *between the owner and the charterer, to which the seaman was not a party.* This case, having nothing to do with any facts similar to the case at bar, is irrelevant herein.

Conekin v. Lockwood, 231 Fed. 541, was a case wherei the issue was the seaman's right to share in salvage pro ceeds in the face of an alleged agreement to accept on month's wages in lieu thereof. However, the case wa specifically decided on two bases: (1) That there in fac was no contract entered into by the seaman, the cour stating:

> "On the whole . . . it would scarcely appea that there was any finally accepted agreement en tered into by libelant to receive a month's extr pay in all cases of salvage. . . ." and

(2) Section 4535 of the U. S. Revised Statutes provide that any stipulation by which a seaman abandoned an right to salvage would be inoperative. It is obvious tha this cited case has no application to the action at ba where there was in fact a contract and where ther was no statutory bar to the seaman's entering into suc a contract.

Gaynor v. The New Orleans, 54 Fed. Supp. 25. There Judge Goodman, in deciding in favor of a seaman's lie (there being no question of a seaman's stipulation t forego any right) on the vessel, set out the precise poin which supports appellants' contention herein:

> "Seaman's lien is a property right given by law . . . as a result of services to a vessel . . . i cannot be contractually waived . . . *unless fo a valid consideration.*" (Emphasis added.)

In *Cortes v. Baltimore Insular Line,* 287 U. S. 367 the entire and sole question involved before the Suprem Court was whether the death of a seaman resulting fron the negligent omission to furnish care or cure was death for personal injury within the meaning of th Jones Act. There was no question directly or indirectl

involved as to the validity of a seaman's contract to waive or diminish one of his rights. Nothing was brought up before the court about such a proposition and neither side presented authorities in that regard because it was not involved. Under such circumstances the statement of the Court therein with reference to maintenance and cure is, of course, pure dicta and cannot be considered as binding or authority or precedent by this Honorable Court, it being an incidental remark extraneous to the questions involved. (*KVOS, Inc. v. Associated Press,* 299 U. S. 269; *Harvey Co. v. Malley,* 288 U. S. 415.)

The next case cited by appellee on this proposition is that of *Harden v. Gordon,* Fed. Cases 6047, in which Justice Story first enunciated the "ward of admiralty" doctrine in 1823. Justice Story's decision, too, fits in exactly with appellants' position:

> ". . . hence, every deviation from the terms of the common shipping paper is rigidly inspected, and if additional burthens or sacrifices are imposed on the seaman *without adequate remuneration,* the court feels itself authorized . . . to moderate or annul the stipulation." (Emphasis added.)

Again the clear import of this decision also is that if there is adequate consideration such a contract is enforceable.

Appellee also cites *DeZon v. American President Lines,* 318 U. S. 660, in which again nothing appears but pure *obiter dicta,* the sole two issues there involved being whether a shipowner was liable for the negligence of the ship's doctor and whether, in that case, there was in fact any negligence on the part of said doctor. There was nothing directly or indirectly involved there con-

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> "On the whole . . . it would scarcely appear that there was any finally accepted agreement entered into by libelant to receive a month's extra pay in all cases of salvage. . . ." and

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cerning the validity of a seaman's contract to waive a right for a consideration.

Appellee next cites three cases, *Venides v. United Greek Shipowners Corp.,* 168 F. 2d 681, *Glandzis v. Callinicos,* 140 F. 2d 111, and *Lakos v. Saliaris,* 116 F. 2d 440, which this reply brief will deal with together as they involve generally the same circumstances. In the *Venides* and *Lakos* cases certain moneys were to be held back from the seamen's wages and sent abroad to a foreign bank and in each case our courts held that this was an allotment prohibited by 46 U. S. Code 596, 597 or 599. These decisions have no part in the case at bar as the present Vitco case is not concerned with a contract specifically prohibited by law. The *Glandzis* case is inapplicable as the contract which was in effect was between the Greek government and the shipowner, and not, as here, between the seaman acting through his union and the owners of the vessel.

The case of *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U. S. 36, has nothing to do with a seaman's contract and, too, is inapplicable.

Appellee's citation of *McCarthy v. Steam-Propeller City of New Bedford,* 4 Fed. 818, on page 13 of his brief, as being authority for the proposition that a seaman's rights cannot be cancelled out by private agreement, has nothing whatsoever to do with such a theory. It is a long decision on whether a seaman's wages could be garnished and contains an excellent dissertation on the rights and obligations involved in the history of garnishment but is completely irrelevant to the issues herein.

In the case of *The San Marcos,* 27 Fed. 567, a seaman agreed that any wages due him would be forfeited if he

absented himself without leave. Again, *there was no consideration for such a promise,* and the decision has nothing whatever to do with the present case.

The case of *Lakos v. Saliaris,* 116 F. 2d 440 has been referred to hereinabove.

In summarizing the appellee's authorities on this point, it is readily seen that in none of them has a court decided that a seaman's contract to give up a right for a consideration (unless specifically made invalid by statute) was unenforceable. To the contrary, the courts have, in effect, held in the cases involved that such may be done for a valid consideration (see *Harden v. Gordon and Gaynor v. The New Orleans, supra*).

It appears to be appellee's position that a seaman, *per se,* is incapable of entering into a contract by which he gives up a right for a consideration and that the courts should consider such a contract as void as one entered into, for example, by an insane person. In this respect it seems that the appellee's attack on the collective bargaining agreement's paragraph V [Resp. Ex. B] is based on two propositions (a) that the seaman is incapable of entering into such agreement, or (b) such agreement is void as against public policy. Accordingly, appellants will discuss these two alleged bases in order:

(a) Although in 1823 Judge Story held that the seaman was a "ward of admiralty" no court yet has ever held that a seaman cannot validly contract (except in cases specifically prohibited by statute). Furthermore, the courts have always held that a seaman may, for a consideration, contract away his rights under the general maritime law, under the Jones Act, and under the maintenance and cure doctrine, *after* they have arisen, through the medium of a release which is, of course, merely

another form of contract or stipulation. (*Garrett Moore-McCormack Co.,* 317 U. S. 239.) If a seam may release his rights for a consideration after th have arisen or partially arisen, then he is certainly ca able, under the law, of releasing them for a considerati *before* they have arisen. The courts, by allowing se man's release to be enforced, have obviously not class seamen with idiots or others incapable of contractin This being so, there is nothing to prohibit a contra such as the one involved here and the courts have nev so prohibited it.

Turning from the courts to the legislature to determi if there is any prohibition, we find that although the Co gress has specifically set out that certain contracts ma by seamen are void, such as allotment of wages, salva shares, etc., the Congress has never seen fit to inclu in such prohibitions the seaman's rights to maintenan and cure, damages under the Jones Act, wages to t end of the voyage, and his contracts in connection ther with.

(b) With regard to appellee's stand in connecti with the holding by the trial court herein that par graph 5 of the collective bargaining agreement [Res Ex. B] was void as against public policy, appellan respectfully submit that:

First, there was no attack, either at the trial or appellee's brief, on the collective bargaining agreemer In it is set out that the union was recognized as t exclusive bargaining representative of all of the er ployees covered by the agreement [Par. I of Res Ex. B.] Vitco and the vessel "PIONEER" were bo covered thereby [Supp. Tr. pp. 3 and 4]. In the absen of evidence to the contrary this relationship of age

and principal between Vitco and his union must stand. Further, and this is of greatest importance, the trial court did not find such collective bargaining agreement void except as to paragraph V thereof.

As for this public policy, it appears that the entire doctrine of the "ward of admiralty" theory stems from Justice Story's decisions and the reasons behind it in the *Harden v. Gordon* case (*supra*). What were the reasons and do they now exist? In that case, Justice Story stated:

> "Every court should watch with jealousy on encroachment upon the rights of seamen, *because they are unprotected and need counsel*". (Emphasis added.)

In a contemporary case involving seamen and their contractual rights, *Brown v. Hull,* 4 Fed. Cases 407, Justice Story at page 409 in setting out the *reasons behind* the "ward of admiralty" doctrine, stated:

> ". . . bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; *for they involve great inequality of knowledge, of forecast, of power, and of conditions.* Courts of Admiralty *on this account* are accustomed to consider seamen as *peculiarly entitled to their protection*". (Emphasis added.)

The true and only reason for the courts adopting the status apparently, of guardian and ward relating to the seaman is that the seaman is "unprotected" and is "inequal" in "power" and "knowledge" to the shipowners. *This condition simply does not exist today* for the reasons heretofore set out in appellants' opening brief. The power and knowledge of the maritime labor unions act-

ing for their members has completely cut away t
basis of this doctrine. The law being a living thing a
being based on reason, it should and must change as t
country's economic and sociological changes are mad
The changed conditions must be recognized for the simp
fact that they exist. On this point appellants repeat t
words of the Supreme Court in *Patton v. United State*
281 U. S. 276 at 306:

> "The truth is that the theory of public poli
> embodies a doctrine of vague and variable qualit
> and unless deducible in the given circumstances fro
> constitutional or statutory provisions, should be a
> cepted as the basis of a judicial determination, if
> all, only with the utmost circumspection. *The publ*
> *policy of one generation may not, under chang*
> *circumstances, be the public policy of another.*" (Em
> phasis added.)

In the field of law, when the reasons for the existen
of a doctrine have disappeared, in all due conscien
the doctrine itself should disappear.

There never having been a decision by any court o
the exact point herein involved, it is respectfully urg
that this Honorable Court make its decision on t
question of public policy in this case in accordance wi
the facts as they exist today and not as they did in 182

2. On the question of the validity of paragraph XI
of the collective bargaining agreement [Resp. Ex. B] an
the length of the term for which Vitco was hired, t
appellants contend:

First of all, appellee states that the appellants admitte
in the answer that Vitco had been hired for the tur
fishing season of the year 1952. Appellee's counsel com
pletely overlooks the pre-trial stipulation entered in

by counsel for the parties on November 12, 1954, under Rules of Civil Procedure, Rule 16, superseding the pleadings and defining the issues. Under the heading therein of "Unadmitted Fact to be Litigated by the Parties" is to be found the issue: "Whether or not libelant was employed by the respondents pursuant to an oral agreement of hiring for the period of the entire fishing season of the year 1952." [Third Supp. Record on Appeal, pp. 2, 3.] The pre-trial stipulation setting forth the issues and superseding the pleadings is a full answer to appellee's statement on this point in his brief.

Paragraph XIV of the collective bargaining agreement [Resp. Ex. B] is clear and unambiguous:

> "When crew members are hired, they are hired for the season and may be discharged only for good cause shown.
>
> "For boats fishing tuna all-year round, there shall be two tuna seasons within a year. One season shall commence on January 1st and end on the following June 30th, and the next season shall commence on July 1st and end on the following December 31st. . . ." [Par. XIV, Resp. Ex. B.]

It is clear that this provision, which was not declared invalid or void by the trial court, plainly sets out that when Vitco was hired, he was hired for the season, and then goes on and carefully defines the meaning of the word "season" as used therein. When Vitco fell ill in January, 1952, he had been hired for that season which by definition ended on June 30, 1952. Under all of the circumstances most adverse to appellants, Vitco was still entitled, at the most, to his share of the catch to the end of the season during which he fell ill, that is, to and including the voyage which began prior to June 30, 1952, and ended July 25, 1952.

Further, appellants maintain that there was no e dence adduced of any contract for a year and that a pellee failed to bear his burden of proof in that regar that if in fact there was such a contract, it was witho consideration since the shipowner received nothing f such a contract, the collective bargaining agreement ready being in existence, and, moreover, that such "o contract" was subordinate to the collective bargaini agreement provisions.

3. On the question of the duration of the maintenar and cure, this is a matter on which apparently neith counsel for the parties has been able to find a ca directly in point, that is, where the question was broug up as to whether the seaman is entitled to maintenar and cure until the date he has reached his maximum cu according to the medical evidence, or until the date wh medical evidence has declared that he reached it some prior time. Although the amount here involved this point is small, it is a most important phase of t case, for the decision of this Honorable Court will the only decision extant. On this subject appellar have three additional cases supporting their view that t seaman is entitled to maintenance and cure only until t maximum recovery has been made:

In the case of *McLeod v. Union Barge,* 204 F. 2d 68 it was held that the point where maintenance and cu payments ceased was when "she reached the point her recovery . . . where care and further treatme would not benefit her."

In *Haywood v. Jones & Laughlin Steel Corp.,* 107 Fe Supp. 108 the court held that the liability for maintenar and cure does not extend beyond the time when the max mum cure possible has been effected.

The court in *Desmond v. United States,* 105 Fed. Supp. 9, stated:

> ". . . the duty to provide . . . extends until a seaman has reached his maximum possible cure."

As stated above, although this point involves but a small sum of money herein, a decision on this point adverse to the appellants contention, could well give rise to numerous fraudulent claims wherein the seaman, after reaching a point of maximum benefit, could avoid further medical examination for a matter of years until required so to do as a discovery proceeding in litigation and then recover, under this Honorable Court's decision, for maintenance and cure during the interim period when, as a true matter of law and equity, he would not be entitled thereto. Too, if the criterion is set up by this Honorable Court as being the date on which medical evidence states the seaman reached the maximum recovery at a prior time, all maintenance and cure cases in the future may be subject to confusion and doubt. For example, if two or more doctors, including United States Public Health Service physicians, testify that on varying dates they determined that at a prior date the seaman had reached his maximum cure, it will be very difficult and highly confusing to attempt to determine which of the doctors' varying dates should be taken as the end of the maintenance and cure period. It is strongly urged by appellants that this Honorable Court reverse the trial court on this point and approve the standard set up by the Supreme Court in *Farrell v. United States,* 336 U. S. 511 at pages 518 and 519:

> "That the duty of the ship to maintain and care for the seaman after the end of the voyage only *until he was so far cured as possible,* seems to have

been the doctrine of the American admiralty cou
prior to the adoption of the Convention by Congre
. . . It has been the rule of admiralty courts sin
the convention." (Emphasis added.)

Conclusion.

From the evidence adduced at the trial, the authorit
and the law, and the burden of proof resting on t
appellee in the trial court, it is respectfully urged th
the appellee's judgment for $5,843.00 be decreased
$270.00; that the appellee take nothing for his share
the catch, or in the alternative that his judgment f
$6,681.95 for such share be reduced to $5,213.91, t
amount authorized under paragraph XIV of the collecti
bargaining agreement. [Resp. Ex. B].

Respectfully submitted,

ROBERT SIKES,

Proctor for Appellants.